MALTA TIMBER PRODUCTS SDN BHD

v.

N & P CONSTRUCTIONS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[COMPANIES (WINDING-UP) NO: D4-28-1050-2002]
12 SEPTEMBER 2003

COMPANY LAW: *Winding-up - Insolvency - Opposition to petition - Goods sold and delivered - Debt disputed upon substantial grounds - Existence of bona fide cross-claim - Existence of a novation - Whether respondent not insolvent - Whether not a case of neglecting to pay debts - Whether petition an abuse of process - Companies Act 1965, ss. 217, 218(1)(e)*

The petitioner had sought to wind-up the respondent under s. 218 of the Companies Act 1965 upon grounds that the respondent had failed to pay a debt amounting to RM42,686.75 for goods sold and delivered. Opposing the petition, the respondent argued that it had a cross-claim of RM56,010 against the petitioner, being damages for breach of contract (on account of latent defects in the goods), and further that there was a novation by one Incol Contract (M) Sdn Bhd, a debtor of the respondent, who, with the consent of the petitioner, had agreed to settle the alleged on behalf of the respondent. The petitioner nonetheless contended that the petition ought to be allowed as the respondent, by letter dated 23 September 2002, had requested for a grace period to pay the demanded sum and had thereby impliedly admitted to the debt. Before the learned judge, the respondent explained the letter by saying that the same was written in ignorance of its legal rights consequent upon the novation. The primary issue that arose was whether the petition, on the facts and the circumstances, could be allowed.

Held:

[1] This was not a case of the respondent being totally insolvent but sought to challenge the petition notwithstanding. The respondent, clearly, cannot be categorised as a company who has neglected to pay its debt, and that being so, the proper course for the petitioner would be to cause the matter to be adjudicated as an action for debt. In the circumstances, the petition must be interpreted as an abuse of process. (p 576 d-g)

[2] Whilst it is true that the test of insolvency is that the company is unable to pay its current debt as they fall due, the present petition falls in a different category. The debt was disputed and there was a cross-claim and a novation of the contract. Further, there was no evidence that the respondent had an excess of current liabilities over its current assets. (p 577 g-h)

[3] A cross claim of some substance would be a good ground to warrant a dismissal of a petition. The cross-claim of RM56,010 herein was genuine and *bona fide*, and had far exceeded the petitioner's alleged debt. The existence of such a cross-claim, hence, constituted a valid ground for dismissing the petition. The cross-claim apart, by virtue of the novation letter of 8 August 2002, the respondent had no longer owed the alleged sum. The petitioner was just not a "creditor" of the respondent within the meaning of s. 217 of the Companies Act. (p 581 d & 582 c-d)

[4] Read in isolation, the letter of 23 September 2002 would appear to contain an implied admission of the alleged debt. But the weight to be attached to this letter must depend on the surrounding circumstances upon which it was written. One crucial aspect was the petitioner's letter of 8 August 2002 wherein there was a novation of the alleged debt. Due regard too must be given to the respondent's explanation. (p 583 e)

[4a] The respondent's explanation for the alleged admission as being made erroneously in that the respondent was ignorant of its legal rights consequent upon the novation, was indeed a reasonable one. At any rate, in the final analysis, the effect of the alleged admission depended on the question of whether there was novation. That question has been answered by this court in the positive. Even if the court was in error, the question posed could still be decided at the trial proper and not at this stage by way of a petition. (p 584 a-b)

[Petition dismissed.]

Case(s) referred to:

Aktion [1987] 1 Lloyd's Rep 283 ***(refd)***
Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***
Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd [1989] 2 MLJ 423 ***(refd)***
Bata (M) Sdn Bhd v. Malacca Importers & Exporters Haulage Co Bhd [1995] 2 CLJ 946 ***(refd)***
In re Hinchliffe, A Person Of Unsound Mind, Deceased [1895] 1 Ch 117 ***(refd)***
Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618 HC ***(refd)***
Kah Seng Construction Sdn Bhd v. Selsin Development Sdn Bhd [1997] 1 CLJ Supp 448 HC ***(refd)***
Long Yick Realty Co Sdn Bhd v. Asia Commercial Finance (M) Bhd [1994] 2 MLJ 306 ***(refd)***
LYL Hooker Sdn Bhd v. Tevanaigam Savishthri [1987] 2 MLJ 52 ***(refd)***
Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd [1980] 2 MLJ 53 ***(refd)***
Malaysian International Merchant Bankers Bhd v. Datuk Mohd Salleh [1988] 2 CLJ 90; [1988] 1 CLJ (Rep) 786 HC ***(refd)***
Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 96 SC ***(refd)***
Mt Munia v. Manohar Lal & Ors [1941] AIR (Oudh) 429 ***(refd)***
Nagubai v. B Shama Rao [1956] SC 593 ***(refd)***
Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 ***(refd)***
Ng Tai Tuan v. Chng Gim Huat Pte Ltd [1991] 1 MLJ 338 HC ***(refd)***
NKM Development Sdn Bhd v. Irex Sdn Bhd [1988] 1 CLJ 65; [1988] 2 CLJ 56 HC ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 3 MLJ 332 ***(refd)***
Permata Merchant Bank Bhd v. Glove Seal Sdn Bhd [1994] 1 CLJ 389 HC ***(refd)***
Polygram Records Sdn Bhd v. The Search & Anor [1994] 3 CLJ 806 HC ***(refd)***
Rasbora Ltd v. JCL Marine Ltd [1977] 1 Lloyd's Rep 645 ***(refd)***
Re Ban Hong Co Ltd [1959] MLJ 100 ***(refd)***
Re Glendbawn Park Pty Ltd [1977] 2 ACLR 288 ***(refd)***
Re Great Eastern Hotel (Pte) Ltd [1989] 1 MLJ 161 ***(refd)***
Re KL Tractors Ltd [1954] VLR 505 ***(refd)***
Re Laceward Ltd [1981] 1 All ER 254 ***(refd)***
Re Lympne Investments Ltd [1972] 2 All ER 385 ***(refd)***
Re Mechanised Construction Pte Ltd [1989] 3 MLJ 9 HC ***(refd)***
Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd v. Nima Travel Sdn Bhd [1986] 2 MLJ 374 ***(refd)***
Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1985] 1 MLJ 84 ***(refd)***
Tatlock v. Harris [1789] 3 TR 174 ***(refd)***
Viking Consultants Pte Ltd v. Syarikat Jaya Utara Construction (Kedah) Sdn Bhd [1990] 1 CLJ 573; [1990] 3 CLJ (Rep) 321 HC ***(refd)***
Wharton v. Walker [1825] 4 B & C 163 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 217, 218(1)(e)
Contracts Act 1950, s. 63
Rules of the High Court 1980, O. 18 r. 19

For the petitioner - John Clark Sumugod; M/s Sidek Teoh Wong & Dennis
For the respondent - GP Chan; M/s Richard Voon & Assoc
For the official receiver - Siti Salwa Sulaiman

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

The Petition

Enclosure one (1) was the petition presented by the petitioner and filed on 12 November 2002 to wind up the respondent under the provisions of the Companies Act 1965. The respondent vigorously opposed the petition and raised the issues of, *inter alia*, novation of the contract and the cross-claim. The petitioner, on the other hand, argued that the respondent was insolvent and unable to pay its debt and that the respondent had admitted the petitioner's claim.

The Facts And The Law Thereto

Between October 2001 and July 2002, the petitioner supplied and delivered construction materials to the respondent. Payments were effected by the respondent but a sum of RM42,686.75 remained outstanding as at 31 July 2002. On 24 September 2002, the petitioner through its firm of solicitors Messrs Sidek Teoh Wong & Dennis served a notice of demand to the respondent for the sum of RM42,686.75 pursuant to s. 218 of the Companies Act 1965. That notice of demand was worded as follows (see enclosure one (1) of exh. "NPC2" – the relevant parts only):

> **NOTICE PURSUANT TO SECTION 218 OF THE COMPANIES ACT, 1965**
> **Re: Outstanding Amount of RM42,686.75 as at 31.7.2002**
>
> TAKE NOTICE that you are now required to pay to us as solicitors for Malta Timber Products Sdn Bhd of address at No: 1, Jalan 2/149B, Taman Sri Endah, Seri Petaling, 57000 Kuala Lumpur the sum of forty two thousand six hundred eighty six and sen seventy five only (RM42,686.75) being (the) amount outstanding as at 31.7.2002 pursuant to your purchase orders of which particulars are found in Appendix 'A' annexed herewith WITHIN twenty one (21) days from the date hereof failing which you shall be deemed to be unable to pay your debt and insolvent and action will be taken for the winding-up of N & P Constructions Sdn Bhd (Co. No. 359612-T).
>
> Dated this 23rd September 2002.

That notice of demand under s. 218 of the Companies Act 1965 was served to the respondent personally as well as by way of a registered post. This was not denied by the respondent at all.

Inability to pay the debt had prompted the petitioner to file the petition for winding-up of the respondent in enclosure one (1). It is the most popular ground to wind up a company and it is grounded on s. 218(1)(e) of the Companies Act 1965. Generally, an inability to pay is proved by service of the statutory notice under s. 218 of the Companies Act, 1965 or by some other proof of insolvency. Here, there was ample proof of service of the statutory notice. According to the case of *Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 96, a creditor who has not been paid, *prima facie* has a right to file a petition for winding-up notwithstanding his motives for doing so. Here, I am not concerned about the motives of the petitioner to wind up the respondent. Here, I need only to be concerned about the facts and the prevailing law.

Now, what did the respondent do upon receipt of that statutory notice of demand? Obviously the respondent did not remain silent. On 7 October 2002, two weeks after receiving the s. 218 notice, the respondent through its firm of solicitors Messrs Richard Voon & Associates responded by letter and reminded the petitioner's solicitors that the goods supplied by the petitioner to the respondent were defective and that the respondent had thereby sustained loss as a consequence thereof. In that letter too the respondent further warned the petitioner that the respondent would strenuously oppose any winding-up proceeding that the petitioner would commence on the ground of the respondent's non-compliance with the s. 218 notice. That letter can be seen in exh. "PKY4" of encl. 10 and it was worded as follows:

> **Re: Notice pursuant to Section 218 of the Companies Act 1965**
>
> We act for N & P Constructions Sdn. Bhd. of No. 34, Jalan Desa 2/9, Taman Bandar Country Homes, 48000 Rawang, Selangor Darul Ehsan.
>
> We were informed by our client that, you, as Solicitors for Malta Timber Products Sdn Bhd of address at No. 1, Jalan 2/149B, Taman Sri Endah, Sri Petaling, 57000 Kuala Lumpur, have served a notice pursuant to Section 218 of the Companies Act 1965 on our client on 23.09.2002 to demand a sum of Ringgit Malaysia Forty Two Thousand Six Hundred Eighty Six and Sen Seventy Five (RM42,686.75) only due and owing by our client to your client.

Our client has instructed us as follows:

1. The door panels supplied by your client are unfit and/or unsuitable for the bungalow houses;

2. The door panels are defective and thus unsuitable for the said bungalow house all of which is within the knowledge of your client;

3. Despite numerous attempts by our client requesting your client to rectify the defects and replace the door panels, your client chose not to rectify the defects and/or replace the door panels knowing that not rectifying the defects and replacing the door panels will cause delay in handling over the bungalow houses to the Developer; and

4. The failure of your client to rectify the defects and/or replacing the door panels caused my client to incur more costs and expenses to remedy the defects and delay in handling over the bungalow houses to the Developer.

Our client has instructed us to issue summons against your client for the loss, expenses, and damages incurred in rectifying the defective door panels and/or replacing the door panels.

In view of the above circumstances, we are of the opinion that the notice pursuant to Section 218 of the Companies Act 1965 (pre-judgment) is inappropriate as there are many triable issues.

However, our client has instructed us to oppose the winding-up petition strenuously if your client chooses to proceed with the winding-up petition based on the said Notice pursuant (to) Section 218 (of the) Companies Act, 1965.

TAKE NOTICE THAT in the event of the winding-up petition against our client is to be dismissed by the Court, your client shall be liable to our client for any losses, damages, costs and expenses suffered by our client as a result of the winding-up petition.

The respondent then issued through its solicitors Messrs Richard Voon & Associates a letter of demand dated 7 October 2002 addressed to the petitioner demanding from the petitioner the sum of RM56,010 being damages for breach of contract by supplying goods that turned out to be defective. That letter of demand can be seen in exh. "PKY4" of encl. 10 and it was worded in this fashion:

"Re: Claim of RM56,010.00 being the costs and expenses in rectifying the defective door panels supplied by you

We act for N & P Constructions Sdn. Bhd. of No. 34, Jalan Desa 2/9, Taman Bandar Country Homes, 48000 Rawang, Selangor Darul Ehsan.

We were informed by our client that at their request, you agreed and warranted to supply door panels made of good materials fit and suitable (for) bungalow houses which our client contracted with the main contractor of a developer to install of which (it) is within your knowledge.

We were informed by our client that the door panels supplied by you are made of poor materials and are defective due to shrinkage and thus unfit to be used as doors.

We were informed by our client despite numerous attempts by telephone and/or letter by our client requesting you to rectify/replace the defective door panels, you have failed, refused and/or neglected to rectify/replace the defective door panels, fully knowing that the defective door panels without rectification and/or replacement will cause (the) Plaintiff delay in handling over the said bungalow houses to the main contractor who will be late in handling over the said bungalow houses to the Developer (and) thus attracting (the) liquidated damages from the Developer by the main contractor of which will eventually (be) passed to our client.

We were informed by our client that your failure, refusal and/or neglect in rectifying/replacing the defective door panels prompted the main contractor with the consent of our client to employ another contractor to rectify/replace the defective door panels **BUT at our client's own costs and expenses.**

We were further informed due to your failure, refusal and/or neglect in rectifying/replacing the door panels, our client has suffered losses, expenses and damages in the sum of Ringgit Malaysia Fifty Six Thousand and Ten (RM56,010.00) only which is debited to the progress payment due to my client by the main contractor, being the sum expended by the main contractor on behalf of our client in rectifying/replacing the defective door panels.

We are therefore instructed by our client to demand from you which we hereby do the said sum of RM56,010.00 as at 7.10.2002.

TAKE NOTICE THAT unless our client or we as solicitors for our client receive the sum of RM56,010.00 only together with our legal cost of RM100.00 being the cost for issuing this notice within seven (7) days from the date hereof we have our client's strict instructions to commence legal proceedings to recover the entire sum outstanding without further reference to you and you will be liable for further interest and all costs incurred by our client.

TAKE FURTHER NOTICE that any part payment made by you in respect of the above sum will be received and/or accepted strictly on a without prejudice basis by our client subject to our client's legal right to proceed with further legal action on the balance sum outstanding.

Interestingly, it seemed that the respondent's complaints about the petitioner's defective goods were indeed genuine. A director of the petitioner by the name of Leong Keng San even went out of his way to rectify the latent defects complained of, but it was to no avail. The petitioner has not denied this at all (see para. 8 of encl. 8 and exh. "PKY2" of encl. 8 read together with para. 5.3 of encl. 16) and this was the damning feature of this case (*Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep 45 and *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 3 MLJ 332). But, despite the stern warning from the respondent and the demand for the sum of RM56,010, the petitioner still chose to commence the present petition in enclosure one (1). It was for these reasons that the respondent challenged the petition.

The respondent disputed the debt and cross-claimed for the sum of RM56,010. I hold that the respondent here cannot be categorised as a company who has neglected to pay its debt but rather the debt was disputed on substantial grounds (*Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd* [1985] 1 MLJ 84). A winding-up court cannot be used as a debt collection agency. It seems to me that the petitioner here has applied improper pressure onto the respondent in an attempt to collect its debt. This was not a case of the respondent who was totally insolvent and sought to challenge the petition. It must be recalled that the respondent had made payments for some of the construction materials and merely challenged the debt and put in a cross-claim. The proper course for the petitioner to adopt would be for the matter to be adjudicated upon as an action for debt. And that would be an appropriate course of action for the petitioner to undertake (*Re Lympne Investments Ltd* [1972] 2 All ER 385, *Long Yick Realty Co Sdn Bhd v. Asia Commercial Finance (M) Bhd* [1994] 2 MLJ 306, *NKM Development Sdn Bhd v. Irex Sdn Bhd* [1988] 1 CLJ 65; [1988] 2 CLJ (Rep) 56, *Ng Ah Kway v. Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58, *Re Nima Travel Sdn. Bhd. Sun Soon Heng Coach Works Sdn. Bhd. v. Nima Travel Sdn Bhd* [1986] 2 MLJ 374; and *Re Laceward Ltd* [1981] 1 All ER 254). In my judgment, any petition to enforce a disputed debt must be interpreted as an abuse of the process of the court and must be dismissed summarily with costs (*Re Ban Hong Co Ltd* [1959] MLJ 100 and *Re Mechanised Construction Pte Ltd* [1989] 3 MLJ 9, 12). It is also my judgment that any petition which is not *bona fide* and is merely filed to embarrass the respondent must be dismissed with costs. Order 18 r. 19 of the Rules of the High Court 1980 ("RHC") enables the respondent to apply to strike out any petition and the court may act accordingly thereto (*Ansa Teknik (M) Sdn Bhd v. Cygal Sdn Bhd* [1989] 2 MLJ 423; and *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd* [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618). It

is unfortunate that the respondent here did not resort to O. 18 r. 19 of the RHC. Be that as it may, it is my duty to decide whether there is a good, substantial and reasonable dispute (*Re KL Tractors Ltd* [1954] VLR 505). In the present case before me, I would certainly answer this in the positive. The petitioner as the creditor upon receipt of the letter of demand dated 7 October 2002, wherein the respondent demanded from the petitioner the sum of RM56,010 being damages for breach of contract, must have been put on alert and must have become aware that the debt was bona fide disputed and so the petitioner should, by right, have filed an action and then obtain judgment and then finally file the petition (*Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn. Bhd. v. Nima Travel Sdn Bhd (supra)* and *Re Mechanised Construction Pte Ltd (supra)*). But, unfortunately, the petitioner did not do so. In my judgment, a cross-claim of some substance would be a good ground to warrant a dismissal of the petition and it is no difference at all to a situation where the respondent is disputing the debt (*Malayan Plant (Pte) Ltd v. Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 (Privy Council); and *Ng Tai Tuan v. Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338). Obviously, as the law now stands any cross-claim – the present one is not an exception, should be determined at a trial proper instead of by way of a petition (*Viking Consultants Pte Ltd v. Syarikat Jaya Utara Construction (Kedah) Sdn Bhd* [1990] 1 CLJ 573; [1990] 3 CLJ (Rep) 321).

The Petitioner's Case

Simply put the petitioner issued the s. 218 notice and demanded for the debt of RM42,686.75 as at 31 July 2002 allegedly due from the respondent to the petitioner for the supply of construction materials. The petitioner simply ignored the respondent's stern warning and demand for the sum of RM56,010 as cross-claim and the petitioner without obtaining any judgment for that alleged debt proceeded to file the present petition in enclosure one (1) on 12 November 2002 on the ground that the respondent had failed to comply with the s. 218 notice. The petitioner was seeking to wind up the respondent on the ground that the respondent had failed to pay its debt. I am aware that the test of commercial insolvency may be stated in this way: that the company is unable to pay its current debt as they fall due. But the present petition falls in a different category. The debt was disputed and there was a cross-claim. There was also a novation of the contract. Here, there was no evidence that the respondent had an excess of current liabilities over its current assets like the case of *Re Great Eastern Hotel (Pte) Ltd* [1989] 1 MLJ 161, 169. Here, as alluded to earlier, the respondent's cross-claim exceeded the alleged debt.

a **The Respondent's Case**

The alleged debt of RM42,686.75 was vigorously disputed on the following grounds:

(a) Novation

b The respondent contended that by letter dated 8 August 2002, and with the concurrent consent of the petitioner and the respondent, Incol Contract (M) Sdn Bhd – a debtor of the respondent, has kindly agreed to settle the sum of RM42,357.84 to the petitioner on behalf of the respondent. That novation letter can be seen in exh. "PKY1" of encl. 10 and it emanated from the petitioner to the respondent and it was worded in this way (the relevant parts only):

c

8th August 2002

BUILDING MATERIALS SUPPLIED FROM APRIL TO JULY 2002

d With reference to the above, we are please(d) to append herewith the summary for supply of building materials of RM42,357.84 (Ringgit Forty Two Thousand Three Hundred Fifty Seven and Cents Eighty Four Only) to be FULLY settled by Incol Contract (M) Sdn Bhd on your behalf to us.

Kindly signify your consent by signing and returning the duplicate of this letter to us.

e Thank you.

Yours faithfully

MALTA TIMBER PRODUCTS

f SDN BHD
Sgd: Illegible
Sue Tan
Credit Control

We, N & P Constructions Sdn Bhd hereby agree and authorise the aforesaid matter.

g Rubber Stamp Of
N & P Constructions Sdn Bhd
(Co. No. 359612-T)

Sgd: Illegible
...
Name: Pang Kang Yau
h (Please affix the company rubber stamp)

i

I could barely make out the contents of the novation letter as it was quite blur and so I had to reproduce the relevant parts only. Be that as it may, it was quite clear that by virtue of that novation letter the respondent no longer owed to the petitioner the sum of RM42,357.84 and as at 31 July 2002 it became RM42,686.75 as set out in the s. 218 notice. The difference in the amount as stated in the s. 218 notice and in the novation letter came up to RM328.91 which was the interest that was charged by the petitioner (see enclosure one (1) at para. 6 and exh. "NPC2" together with Appendix "A" to enclosure one (1)).

Indeed there was a novation of the contract and it should be best tried at the common law court and not at the winding-up court. In the words of Megarry J in the case of *Re Lympne Investments Ltd (supra)* at p. 389 of the report:

> The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out.

What is novation? For a lucid description as to the meaning of novation, I must refer to the case of *LYL Hooker Sdn Bhd v. Tevanaigam Savishthri* [1987] 2 MLJ 52 at 53 where the court said:

> Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which is already extinguished.

Then there is the case of *Malaysian International Merchant Bankers Bhd v. Datuk Mohd Salleh* [1988] 2 CLJ 90; ([1988] 1 CLJ (Rep) 786) at p. 95 (p. 792) where the court said:

> Novation, no doubt, is an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter is discharged. Usually, but not necessarily, a novation takes the form of the introduction of a new party to the new contract and the discharge of a person who was party to the old contract. (See Volume 9 *Halsbury's Laws of England* (4th edition) paragraph 580). Whether there was consent to novation may, however, be inferred from conduct without express words ... .

This would be followed by an array of cases like *Permata Merchant Bank Bhd v. Glove Seal Sdn Bhd* [1994] 1 CLJ 389; *Bata (M) Sdn Bhd v. Malacca Importers & Exporters Haulage Co Bhd* [1995] 2 CLJ 946; and *Kah Seng Construction Sdn Bhd v. Selsin Development Sdn Bhd* [1997] 1 CLJ Supp 448. In statutory form, there is s. 63 of the Contracts Act 1950 which enacts as follows:

> If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

And it gives a wider perspective of the idea of novation. Indeed Visu Sinnadurai J (as he then was) in *Polygram Records Sdn Bhd v. The Search & Anor* [1994] 3 CLJ 806, explained the wide import of s. 63 of the Contracts Act 1950 in style when he said at p. 817 of the MLJ reporting:

> Section 63 is not limited in its scope to novation as it is understood under English law alone, but also covers situations where the parties have rescinded the earlier contract, by substituting a new one. If there is an intention on the part of both the parties to substitute a new contract, the old need not be performed, even if the new merely alters certain terms of the old. The test basically is this: if a new contract is entered into by the parties, whatever its terms, the old contract is extinguished. It does not, however, cover a situation where the terms of the old contract are merely altered or varied, without a new contract in substitution of it being entered into. In such a case, the old contract, as altered or varied, remains in force.

There are so many ways to describe the word novation. According to the case of *The Aktion* [1987] 1 Lloyd's Rep. 283 at 309, a novation is a contract between debtor, creditor and a third party where the debt owed by the debtor shall henceforth be owed to the third party. This is said not to be an assignment because the consent of all the three parties including that of the debtor, is necessary, and also because the original debt is not, strictly, transferred. And according to the case of *Rasbora Ltd v. J.C.L. Marine Ltd* [1977] 1 Lloyd's Rep 645, the third party's right against the debtor is based on the new contract between him and the debtor. And the third party will fail if no consideration moves from him for the debtor's promise to pay him (*Tatlock v. Harris* [1789] 3 TR 174 at 180; *Cuxon v. Chadley* [1824] 3 B. & C. 591; and *Wharton v. Walker* [1825] 4 B. & C. 163).

I shall revert back to the issue of novation a short while later.

(b) The Respondent's Cross-Claim Based On The Petitioner's Defective Goods
The petition in enclosure one (1) was dated 11 November 2002 and it was filed on 12 November 2002. The respondent's complaints of the defective goods *viz*, the defective door panels on 3 August 2002 as reflected in the letter marked as exh. "PKY2" of encl. 10 must be construed to mean that well before commencing the winding-up proceeding, the petitioner was aware of the respondent's complaints pertaining to the defective goods. The latent defects in the door panels could not be detected at the time of taking delivery. The defects take the form of shrinkages in the door panels supplied by the petitioner to the respondent. The petitioner failed to rectify the defects and the respondent had to rectify those defects and thereby incurred the rectification costs of RM56,010. It was this sum that represented the loss suffered by the respondent as a result of the petitioner's breach of contract for supplying the defective goods.

In my judgment, it was a genuine and *bona fide* cross-claim that far exceeded the petitioner's alleged debt of RM42,686.75. The existence of such a cross-claim constituted a valid ground for dismissing the petition. The following authorities would support this apt conclusion.

In *Viking Consultants Pte. Ltd v. Syarikat Jaya Utara Construction (Kedah) Sdn. Bhd* [1990] 1 CLJ 573; [1990] 3 CLJ (Rep) 321 HC, Zakaria Yatim J (as he then was) at p. 576 (p. 325) of the report said:

> … although the company admitted the debt it has a genuine cross-claim and even though the cross-claim is disputed by the petitioning creditor, no winding-up order should be made against the company.

In *Re Glendbawn Park Pty Ltd* [1977] 2 ACLR 288, Yeldham J at p. 291 observed:

> In my mind that question should be answered by saying that if a counter-claim, whether for liquidated or unliquidated damages, and whether or not arising out of the same transaction, is based upon substantial grounds, it may be relied upon to support an argument that the company's alleged debt is disputed. Clearly the ultimate creditor is that party which recovers the largest sum upon his claim and he is a creditor only for the difference between the two verdicts of judgments.

In *Ng Tai Tuan & Anor v. Chng Gim Huat Pte Ltd* [1991] 1 MLJ 338, Chao Hick Tin JC said at p. 341 of the report:

> The authorities do not appear to draw a distinction between a counterclaim that arises out of the same transaction or contract as the debt owing and a counterclaim which does not. It seems to me that the important thing is that the counterclaim must be *bona fide* and based on substantial grounds.

Finally, the case of *NKM Development Sdn. Bhd. v. Irex Sdn. Bhd. (supra)* should be referred to. There VC George J (as he then was) dismissed the petition because he "was more than satisfied that the alleged debt on which the petition was founded was disputed and on substantial grounds" (see p. 68 of the CLJ report).

Reverting back to the issue of novation, I have held that there was novation. The petitioner's letter dated 8 August 2002 was clear evidence of there being a novation of the alleged debt with the consent of the petitioner, the respondent and Incol Contract (M) Sdn Bhd. That being the case, I must therefore conclude that the respondent did not owe the petitioner the sum of RM42,686.75 as claimed in the s. 218 notice. I must also hold that the petitioner was not a "creditor" of the respondent within the meaning of s. 217 of the Companies Act 1965. In the same vein, Zakaria Yatim J (as he then was) in the case of *Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd (supra)* aptly said at p. 50 to p. 51 of the report:

> Where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor (see *Re Lympne Investment Ltd* [1972] 2 All ER 385 at page 389). If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding-up order. It has no *locus standi* and the petition must fail (see *Mann & Another v. Goldstein & Another* [1968] 2 All ER 769 at page 771).

Now, even if it was argued (which was not the case here) that the consent of all the parties to the novation was not readily discernible from the petitioner's letter dated 8 August 2002, yet the question of whether there was a novation of the alleged debt was a question that could only be decided by way of a trial and not by way of a petition before the winding up court. This was my judgment and I so hold accordingly.

(c) Whether The Respondent's Letter Dated 23 September 2002 Contained An Implied Admission Which Was Conclusive As Against The Respondent In Respect Of The Alleged Debt Of RM42,686.75 Outstanding As At 31 July 2002?

That letter can be seen in exh. "TKC1" of encl. 13 and it emanated from the respondent to the petitioner and it was worded as follows:

23 September 2002

Letter Ref: JCS/GL/1112/02 (MTSB)
Dated 3rd September 2002

With reference to the above letter, we would like to appeal for your kind consideration for the delay in payment of the outstanding amount overdue to you. As you (are) well aware of the current situation and difficulty in payment collection, we have incurred great losses in the running of our construction business and (the difficulty in collecting) the overdue payments from the main contractor.

We sincerely hope that you can give us some grace period for making payment of the outstanding amount overdue to you. Once we receive any payment from our main contractor, we will progressively make payment and settle whatever outstanding amount to you.

Your kind consideration and acceptance of the above is appreciated.

Thank you.

Now, when read in isolation this very letter appears to contain an implied admission of the alleged debt of RM42,686.75. But the weight to be attached to this letter must depend on the surrounding circumstances upon which this very letter was written. One crucial aspect of the surrounding circumstances would be the petitioner's letter of August 8, 2002 wherein there was evidence of a novation of the alleged debt. Due regard too must be given to the respondent's explanations for the alleged admission. The explanations can be seen in an exhibit annexed to the affidavit opposing the petition and it is marked as encl. 10. There the respondent explained that the admission was made in error in that it was made in ignorance of the true legal effect of the petitioner's letter dated 8 August 2002. Exhibits "PKY5" and "PKY6" of encl. 10 should be referred to for further elucidation. Be that as it may, in the case of *In re Hinchliffe, A Person Of Unsound Mind, Deceased* [1895] 1 Ch 117, A.L. Smith L.J. writing a short separate judgment for the Court of Appeal succinctly said at p. 120 of the report:

> When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense. Therefore any person who is entitled to see the affidavit is equally entitled to see the document referred to therein.

And when applied to the facts of the present case, those exhibits in encl. 10 carried a great deal of weight and I should give credence to them. In my judgment, the respondent's explanations for the alleged admission as being made erroneously in that the respondent was ignorant of its legal rights consequent upon the novation was indeed a reasonable one. At any rate and in the final analysis, the effect of the alleged admission depended on the question of whether there was a novation. That question has been answered by me in the positive. Even if I was in error, the question posed could still be decided at the trial proper and not at this stage by way of a petition.

On the question of admission, I need to refer to two cases. The first would be the case of *Nagubai v. B. Shama Rao* [1956] SC 593 where Venkatarama Ayyar J speaking for the Indian Supreme Court said at p. 599 of the report:

> (18) An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.

The second case would be that of *Mt. Munia v. Manohar Lal and Others* [1941] AIR (Oudh) 429 where the headnote carries the following legend:

> An admission which is wrong in point of fact and is evidently made in ignorance of legal rights has no binding effect on the person making it.

Conclusion

For all these reasons, I must and I should dismiss the petition in enclosure one (1) with costs. I did just that.